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**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\*\*\*\*\*

**IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. 43C ) PROPOSAL FOR DECISION  
30007297 BY DEE DEATERLY )**

\*\*\*\*\*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on September 20, 2005, in Columbus, Montana, to determine whether a beneficial water use permit should be issued to Dee Deaterly, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

**APPEARANCES**

Applicant appeared at the hearing by and through counsel, Harley R. Harris. Dee Deaterly, and David M. Schmidt, Senior Water Rights Specialist, Water Right Solutions, Inc., testified for the Applicant.

Objector William Morse appeared at the hearing and testified in his own behalf. Donald Hauenstein was called to testify by Objector Morse.

Objector Donald Hauenstein appeared at the hearing and testified in his own behalf.

Keith Kerbel, Regional Manager, Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department or DNRC) was called to testify by the Applicant.

**EXHIBITS**

Both Applicant and Objectors offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibit Nos. A1-A4.

**Applicant's Exhibit A1** is an 11" x 17" map entitled Watershed Basin Map prepared by Water Right Solutions, Inc. The map was prepared May or June 2005.

1       **Applicant's Exhibit A2** consists of one page entitled "Average Annual Flow (Osborn  
2 Method) prepared by Mr. Schmidt.

3       **Applicant's Exhibit A3** is a two-page copy of *AVERAGE ANNUAL PRECIPITATION*  
4 *MONTANA* based on 1941-1970 base period, prepared by U.S. Department of Agriculture – Soil  
5 Conservation Service, Bozeman, Montana.

6       **Applicant's Exhibit A4** consists of a copy of twenty-five pages from the Soil  
7 Conservation Service document *EVAPORATION POND DESIGN FOR AGRICULTURAL*  
8 *WASTEWATER DISPOSAL*, (February 1974).

9       Objector Morse offered eight exhibits for the record. The Hearing Examiner accepted  
10 and admitted into evidence Objector' Morse's Exhibit Nos. OMA-OMH.

11       **Objector's Exhibit OMA** is a copy of a photograph of East Fiddler Creek taken by  
12 Objector Morse in August 2001.

13       **Objector's Exhibit OMB** is a copy of a photograph of East Fiddler Creek taken by  
14 Objector Morse in August 2001.

15       **Objector's Exhibit OMC** is a copy of a photograph of Objector Morse's upstream  
16 headgate on East Fiddler Creek taken by Objector Morse in August 2001.

17       **Objector's Exhibit OMD** is a copy of a photograph of Objector Morse's upstream  
18 headgate on East Fiddler Creek taken by Objector Morse in August 2001.

19       **Objector's Exhibit OME** is a copy of a photograph of Objector Morse's upstream  
20 headgate on East Fiddler Creek taken by Objector Morse in August 2001.

21       **Objector's Exhibit OMF** is a copy of a photograph of East Fiddler Creek taken by  
22 Objector Morse in August 2001.

23       **Objector's Exhibit OMG** is a one-page copy of an affidavit of Rich Ennenga signed  
24 April 19, 2002.

25       **Objector's Exhibit OMH** is a one-page copy of an affidavit of Charles R. Mussetter  
26 signed April 21, 2002.

## 27 28                                   **PRELIMINARY MATTERS**

29       Prior to the hearing the Applicant amended the application by removing the irrigation  
30 purpose and associated volume. During the hearing the application was amended further to  
31 make all the water in the pond available for a fire protection purpose. No change in the  
32 operation of the pond was contemplated with the addition of the fire protection purpose.

1 Prior to the hearing all Objectors other than Objector William Morse and Objector Donald  
2 Hauenstein withdrew their objections to this Application. The Environmental Assessment (EA)  
3 the Hearing Examiner obtained from the Billings Water Resources Regional Office prior to the  
4 hearing was outdated by the Applicant's prehearing amendments to the Application. The  
5 Hearing Examiner asked the Billings Water Resources Regional Office to update the EA using  
6 the amended Application information, serve copies on the Parties, and send the revised original  
7 EA to the Hearing Examiner. The Parties were allowed ten working days after service of the  
8 revised EA to lodge objections to all or part of the document. No Party filed objections and the  
9 revised EA document was added to the file by the Hearing Examiner.

10 The Hearing Examiner, having reviewed the record in this matter and being fully advised  
11 in the premises, does hereby make the following:  
12

### 13 **FINDINGS OF FACT**

#### 14 **General**

15 1. Application for Beneficial Water Use Permit 43C 30007297 in the name of and signed by  
16 Dee Deaterly was filed with the Department on August 21, 2003. The priority date of the  
17 Application was changed to March 12, 2004, which is the date the Applicant provided  
18 information to the Department to make the Application correct and complete under Mont. Code  
19 Ann. §85-2-302. (Department file)

20 2. The revised EA prepared by the Department for this application on September 21, 2005,  
21 was reviewed and is included in the record of this proceeding. (Department file)

22 3. As noticed, the Applicant sought to appropriate 100 gallons per minute (gpm) up to  
23 161.30 acre-feet of water per year from an unnamed tributary to the East Fork of Fiddler Creek.  
24 The water is to be diverted at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 04, Township 06 South,  
25 Range 17 East, Stillwater County, Montana. The unnamed tributary to East Fork of Fiddler  
26 Creek originates from a spring on land owned by the Applicant. The proposed means of  
27 diversion is a dam. The proposed use is fish and wildlife up to 111.3 acre-feet in a 9.00 acre-  
28 foot capacity onstream reservoir located in the in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ ; 5 acres of lawn and  
29 garden irrigation up to 10 acre-feet in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , and 26.4 acres of irrigation up to 40 acre-  
30 feet in the S $\frac{1}{2}$ NE $\frac{1}{4}$ , all in Section 04, Township 06 South, Range 17 East, Stillwater County,  
31 Montana. The proposed period of diversion and period of use is January 1 to December 31,  
32 inclusive, for the fish and wildlife purpose; and April 15 to October 15, inclusive, for the lawn and

1 garden and irrigation purposes. (Department file, amended application filed May 20, 2005,  
2 testimony of Dave Schmidt)

3 4. A public notice describing facts pertinent to this application was published in the  
4 *Stillwater News*, a newspaper of general circulation on April 29, 2004, and was mailed to  
5 persons listed in the Department file on April 24, 2004. (Department file)

6 5. Applicant amended the application on May 20, 2005, as follows: the irrigation purpose  
7 and associated volume were removed, and the capacity of the reservoir was increased from 9.0  
8 acre-feet to 11.22 acre-feet. During the hearing the application was amended further to make all  
9 the water in the pond available for a fire protection purpose. No change in the operation of the  
10 pond was contemplated with the addition of the fire protection purpose. The modified application  
11 is a subset of the initial application that was described in the public notice. (Department file,  
12 testimony of Dave Schmidt)

13 6. As amended, Applicant seeks to appropriate 100 gallons per minute (gpm) up to 11.22  
14 acre-feet of water per year from an unnamed tributary to the East Fork of Fiddler Creek. The  
15 water is to be diverted at a point in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 04, Township 06 South,  
16 Range 17 East, Stillwater County, Montana. The proposed means of diversion is a dam. The  
17 proposed use is fish and wildlife, and fire protection in an 11.22 acre-foot onstream reservoir  
18 located in the proposed place of use in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 04, Township 06 South,  
19 Range 17 East, Stillwater County, Montana. The proposed period of diversion and period of use  
20 is January 1 through December 31, inclusive, of each year. (Department file, amended  
21 application filed May 20, 2005, testimony of Dave Schmidt)

#### 22 **Physical Availability**

23 7. Applicant measured the flow prior to making the original application for an unknown  
24 length of time. Applicant put a pipe in the spring which is the source of the unnamed tributary to  
25 the East Fork of Fiddler Creek and measured the flow at 100 gpm. Keith Kerbel, Manager of the  
26 Billings Water Resources Regional Office, measured flows immediately upstream of the pond at  
27 120 gpm and immediately downstream of the pond at 130 gpm on June 30, 2005. I find that  
28 water is physically available. (Department file, testimony of Keith Kerbel)

#### 29 **Legal Availability**

30 8. Applicant analyzed the downstream appropriators' water rights using the Department of  
31 Natural Resources and Conservation (DNRC) website. The irrigation season is the time of year  
32 when flows are used by downstream senior appropriators. Demands on the source exceed

1 water available during the irrigation season. There are times during the year outside the  
2 irrigation season when little use is being made by other appropriators and it is during these  
3 times that the pond can be filled. Once the pond is full, Applicant intends to operate the pond so  
4 outflows equal inflows, and to make up water which evaporates from the pond surface from  
5 another water right from the spring which is the source of the unnamed tributary to the East Fork  
6 of Fiddler Creek. Applicant intends to file a Notice of Completion of Ground Water Development  
7 for a developed spring pursuant to the permit exception in Mont. Code Ann. §85-2-306 to  
8 provide for evaporation from the pond. Water requested outside the irrigation season is legally  
9 available. (Department file, testimony of David Schmidt, William Morse)

#### 10 **Adverse Effect**

11 9. Applicant plans to fill the pond outside the irrigation season and operate the pond so  
12 outflow equals inflow after the pond is filled. Applicant plans to use a valve installed in the pond  
13 outlet to control outflows or stop diverting if a valid call is received from downstream  
14 appropriators. The evaporative loss from the pond is estimated at 1.3 gpm by Mr. Schmidt.  
15 Applicant intends to file a Notice Of Completion Of Ground Water Development for a developed  
16 spring pursuant to the permit exception in Mont. Code Ann. §85-2-306 to provide water to make  
17 up for evaporation from the pond. The source on Applicant's property is a gaining source as  
18 evidenced by Mr. Kerbel's measured ten (10) gpm gain in flow between locations upstream of  
19 the pond and downstream of the pond (See Finding Of Fact No. 7 above). In witness  
20 examination regarding seepage losses from the pond, testimony was given that all ponds leak  
21 downstream, and any water that may seep from the pond will follow the topography, which in  
22 this case is back to the stream. When Applicant's plan (outflow equals inflow, and make-up of  
23 evaporative loss from the same source with a permit exception under Mont. Code Ann. §85-2-  
24 306 ) is followed, the effect on prior appropriators during irrigation season at a minimum will  
25 equal the evaporative loss from the pond. Testimony of Mr. Schmidt and Mr. Kerbel indicates  
26 that the evaporation make-up water is from the same source that would eventually reach  
27 downstream prior appropriators. To have no effect on the downstream appropriators, the  
28 evaporative loss must come from a non-tributary source. Downstream irrigators have only had  
29 high water irrigation water since 1995. Downstream appropriators will be adversely affected in  
30 an amount equal to the evaporative loss from the pond. (Department file, testimony of David  
31 Schmidt, Keith Kerbel, William Morse, Donald Hauenstein)

1 **Adequacy of Appropriation Works**

2 10. Applicant constructed the pond in the fall of 2002, and it filled during the winter and  
3 spring of 2003. There is some downstream leakage from all ponds, and any water that may  
4 seep from the pond bottom will follow the topography. However, the pond holds water.

5 (Department file, testimony of Dee Deaterly, David Schmidt, Keith Kerbel)

6 **Beneficial Use**

7 11. Applicant has provided insufficient evidence that the proposed rate and volume of water  
8 requested for the fish purpose is the minimum necessary for the intended purpose. Applicant  
9 does not know how many fish require this amount of water. Applicant has no plan to stock this  
10 pond with any specific number of fish. Applicant provided testimony that the amount of fish that  
11 will make use of the pond is limited by the size of the structure, but offered no other evidence  
12 that the requested amount of water is necessary for fish. It is not known how many fish the pond  
13 is intended to support nor how much water is necessary for the proposed fishery purpose.

14 (Department file, testimony of David Schmidt)

15 12. Applicant has observed wildlife drinking from the pond, but offered no other evidence  
16 that the requested amount of water is the minimum amount necessary for wildlife use. Applicant  
17 submitted no evidence that Applicant has any control over any wildlife that may use the pond or  
18 that the pond is intended to serve any defined population of wildlife. (Department file, testimony  
19 of David Schmidt)

20 13. During the hearing Applicant amended the purpose to include fire protection, however  
21 Applicant provided no evidence that the amount of water requested is the minimum necessary  
22 for the purpose. Applicant has contacted local county authorities; however, no arrangements  
23 have been made with government agencies or local fire departments for access to the water for  
24 their operations, or for specified amounts of water. In addition, per Mont. Admin. R. 36.12.105,  
25 temporary emergency appropriations, such as for fire protection, may be made without prior  
26 approval from the Department when the water is stored under another right. (Department file,  
27 testimony of David Schmidt)

28 **Possessory Interest**

29 14. Applicant is the owner of the property which has been designated in the Application as  
30 the place of use. (Department file)

1    **Water Quality Issues**

2    15.     No objections relative to water quality were filed against this application nor were there  
3    any objections relative to water classification or to the ability of a discharge permit holder to  
4    satisfy effluent limitations of his permit. (Department file.)

5           Based on the foregoing Findings of Fact and the record in this matter, the Hearing  
6    Examiner makes the following:

7  
8                                   **CONCLUSIONS OF LAW**

9    1.     The Department has jurisdiction to issue a provisional permit for the beneficial use of  
10   water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of  
11   the evidence. Mont. Code Ann. §85-2-311(1).

12   2.     A permit shall be issued if there is water physically available at the proposed point of  
13   diversion in the amount that the applicant seeks to appropriate; water can reasonably be  
14   considered legally available during the period in which the applicant seeks to appropriate, and in  
15   the amount requested, based on an **analysis** of the evidence on physical water availability and  
16   the existing legal demands, including but not limited to a comparison of the physical water  
17   supply at the proposed point of diversion with the existing legal demands on the supply of water;  
18   the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a  
19   state reservation will not be adversely affected based on a consideration of an applicant's **plan**  
20   for the exercise of the permit that demonstrates that the applicant's use of the water will be  
21   controlled so the water right of a prior appropriator will be satisfied; the proposed means of  
22   diversion, construction, and operation of the appropriation works are adequate; the proposed  
23   use of water is a beneficial use; the applicant has a possessory interest, or the written consent  
24   of the person with the possessory interest, in the property where the water is to be put to  
25   beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not  
26   be adversely affected, the proposed use will be substantially in accordance with the  
27   classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of  
28   a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

29   3.     A public notice containing the facts pertinent to the permit application must be published  
30   once in a newspaper of general circulation in the area of the source and mailed to certain  
31   individuals and entities. Mont. Code Ann. §85-2-307. (See Finding of Fact Nos. 3, 4)  
32   Modifications to an application may be considered in a proceeding previously publicly noticed so

1 long as potential objectors are not prejudiced. Modification to an application can cause prejudice  
2 in some cases. Lack of complete notice means that persons potentially affected by the  
3 modification have been given insufficient information to determine the likelihood of whether they  
4 would be adversely affected. See In the Matter of the Application for Beneficial Water Use  
5 Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the Application  
6 for Beneficial Water Use Permit No. 24591-q41H by Kenyon-Noble Ready Mix Co., Proposal for  
7 Decision (1981).

8 4. Here, the modified application is a subset of the original application. (See Findings of  
9 Fact Nos. 3, 5, 6) Therefore, parties to the case are not prejudiced. The modification does not  
10 increase the burden on the source beyond that identified in the public notice; therefore, other  
11 potential objectors are not prejudiced and the amended application does not have to be re-  
12 noticed according to Mont. Code Ann. §85-2-307.

13 5. The Applicant has proven that water is physically available at the proposed point of  
14 diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont.  
15 Code Ann. §85-2-311(1)(a)(i). See Finding of Fact No. 7.

16 6. The Applicant has proven that water can reasonably be considered legally available  
17 when the pond is filled outside the time period within which downstream irrigation rights exist  
18 according to the Department Water Right Records. Downstream appropriators would have a  
19 legal demand for water during irrigation season. Mont. Code Ann. §85-2-311(1)(a)(ii). See  
20 Finding of Fact No. 8.

21 7. The Applicant has not proven by a preponderance of the evidence that the water rights  
22 of prior appropriators under existing water rights, certificates, permits, or state reservations will  
23 not be adversely affected. The Applicant's plan is to take water from the source, pursuant to an  
24 exception under Mont. Code Ann. §85-2-306, to make-up evaporative losses from the pond.  
25 The Hearing Examiner recognizes that a person may apply for a permit exception under Mont.  
26 Code Ann. §85-2-306. However, acquiring pond evaporation make-up water from a water right  
27 from the same source, that is, removing water which would contribute to downstream flows,  
28 increases the burden on the source and does not prevent adverse effect on prior downstream  
29 appropriators during irrigation season. Mont. Code Ann. §85-2-311(1)(b). See Finding of Fact  
30 No. 9.



1 8. The Applicant has proven that the proposed means of diversion, construction, and  
2 operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See  
3 Finding of Fact No. 10.

4 9. The Applicant has not proven the proposed fish and wildlife use of water is a beneficial  
5 use of water for which Applicant can establish a water right under a permit because the  
6 Applicant provided no evidence of a defined population of fish or wildlife which this water is  
7 intended to support. The Applicant has not provided evidence to establish a direct correlation  
8 between the amount of water applied for and the need for that amount of water to sustain a  
9 defined fishery or wildlife population. The Applicant has not proven by a preponderance of  
10 evidence that the quantity of the water proposed to be used is the minimum amount necessary  
11 for the proposed beneficial use. See In The Matter of Bitterroot River Protective Association v  
12 Kenneth R. and Judith A. Siebel and the Montana Department of Natural Resources and  
13 Conservation, Cause No. BDV-2002-519, Order On Petition For Judicial Review, Montana First  
14 Judicial District Court (2003); Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326  
15 Mont. 241, 108 P.3d 518. In addition, the Department may not issue a permit for more water  
16 than can be beneficially used without waste. See Mont. Code Ann. §85-2-312(1). Waste is the  
17 unreasonable loss of water or the application of water to anything but a beneficial use. See  
18 Mont. Code Ann. §85-2-102(19). Here, the quantity of water needed for fish and wildlife use was  
19 not justified, and there is no evidence to show the amount of water requested is not a waste of  
20 water. Mont. Code Ann. §85-2-311(1)(d). See Finding of Fact Nos. 11, 12.

21 10. The Applicant has not proven the proposed fire protection use of water is a beneficial  
22 use of water for which Applicant can establish a water right under a permit because the  
23 Applicant provided no evidence of a defined volume of water needed for fire suppression which  
24 this water is intended to support. The Applicant has not provided evidence to establish a direct  
25 correlation between the amount of water applied for and the need for that amount of water to  
26 suppress fires. The Applicant has not proven by a preponderance of evidence that the quantity  
27 of the water proposed to be used is the minimum amount necessary for the proposed beneficial  
28 use. See In The Matter of Bitterroot River Protective Association v Kenneth R. and Judith A.  
29 Siebel and the Montana Department of Natural Resources and Conservation, Cause No. BDV-  
30 2002-519, Order On Petition For Judicial Review, Montana First Judicial District Court (2003);  
31 Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326 Mont. 241, 108 P.3d 518. In  
32 addition, the Department may not issue a permit for more water than can be beneficially used

1 without waste. See Mont. Code Ann. §85-2-312(1). Waste is the unreasonable loss of water or  
2 the application of water to anything but a beneficial use. See Mont. Code Ann. §85-2-102(19).  
3 Here, the quantity of water needed for fire protection was not justified, and there is no evidence  
4 to show the amount of water requested is not a waste of water. Mont. Code Ann. §85-2-  
5 311(1)(d). See Finding of Fact No. 13.

6 11. The Applicant has proven he has possessory interest in the property where water is to  
7 be put to beneficial use. Mont. Code Ann. §85-2-311(1)(e). See, Finding of Fact No. 14.

8 12. No objection was raised as to the issue of water quality of a prior appropriator being  
9 adversely affected, the proposed use not being in accordance with a classification of water, or  
10 as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Therefore,  
11 the water quality criteria need not be proven by the Applicant. Mont. Code Ann. §85-2-311(1)(f),  
12 (g), (h). See, Finding of Fact No. 15.

13 13. The Department may issue a permit subject to terms, conditions, restrictions, and  
14 limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use  
15 permit. Applicant has not met the criteria for issuance of a permit when conditions are applied.  
16 Mont. Code Ann. §85-2-312. See Conclusions of Law Nos. 7, 9.

17 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the  
18 Hearing Examiner makes the following:  
19

### 20 **PROPOSED ORDER**

21 Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly is  
22 **DENIED**.  
23

### 24 **NOTICE**

25 This Proposal for Decision may be adopted as the Department's final decision unless  
26 timely exceptions are filed as described below. Any party adversely affected by this Proposal for  
27 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral  
28 argument. Exceptions and briefs, and requests for oral argument must be filed with the  
29 Department by **March 7, 2006**, or postmarked by the same date, and copies mailed by that  
30 same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time period, and due consideration of *timely* oral argument requests, exceptions, and briefs.

Dated this 15<sup>th</sup> day of February 2006.

/ Original Signed By Charles F Brasen /

Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

## **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 15<sup>th</sup> day of February 2006 by first class United States mail.

HARLEY HARRIS  
PO BOX 1144  
HELENA MT 59624

DONALD K HAUENSTEIN  
1 S FIDDLER CREEK RD  
FISHTAIL MT 59028

MR DEE DEATERLY  
400 SUBSTATION ROAD  
VENICE FL 34292

**CC:**  
WILLIAM R MORSE  
2511 1 ST AVE N  
BILLINGS MT 59101

WILLIAM R MORSE  
PO BOX 550  
ABSAROOKEE MT 59001

DNRC WATER RESOURCES  
BILLINGS REGIONAL OFFICE  
AIRPORT BUSINESS PARK  
1371 RIMTOP DRIVE  
BILLINGS MT 59105-1978

/ Original Signed By Cindy Forgey /

HEARINGS UNIT  
406-444-6615

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

\* \* \* \* \*

<b>IN THE MATTER OF APPLICATION FOR            )</b>	
<b>BENEFICIAL WATER USE PERMIT NO. 43C-    )</b>	<b>FINAL ORDER</b>
<b>30007297 BY DEE DEATERLY                    )</b>	

\* \* \* \* \*

Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Mont. Code Ann.), to the contested case provisions of the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on September 25, 2005, in Columbus, Montana before Hearing Examiner Charles Brasen to determine whether the issuance of a beneficial water use permit to Dee Deaterly (hereinafter “Applicant”) would be consistent with the requirements of Mont. Code Ann. § 85-2-311. Applicant, by means of an application amended at the hearing, proposed to appropriate 100 gallons per minute (g.p.m.) up to 11.22 acre feet (a.f.) annually for fish, wildlife and fire protection purposes with a period of diversion from January 1 to December 31.

As a result of that hearing, a Proposal for Decision was entered on February 15, 2006. The Proposal for Decision recommended denial of the application, concluding that the Applicant had failed to prove, by a preponderance of the evidence, that the statutory criteria imposed by Mont. Code Ann. § 85-2-311 relevant to this application were met. The Proposal concluded that the Applicant had failed to prove by the requisite standard that existing water rights would not be adversely affected were the application granted. The Proposal also concluded that the Applicant failed to prove by the requisite standard that the proposed fish and wildlife use of the proposed appropriation is a beneficial use (COL 7) for two reasons: because the Applicant provided no evidence of a discrete wildlife population the appropriation applied for “is intended to support” (COL 9) and because the Applicant “had not proven by a preponderance of the evidence that the quantity of the water proposed to be used is the minimum amount necessary for the proposed

beneficial use.” (COL 9).

Applicant, represented by Harley Harris, Esq., filed timely exceptions to the Proposal for Decision on March 17, 2006. On May 3, 2006, Objector William Morse also filed what were captioned as exceptions to the Proposal for Decision but appear to respond to Applicant’s exceptions and argue in support of the Proposal for Decision. On the 9<sup>th</sup> of May, 2006, Applicant filed a reply to Objector Morse’s exceptions, objecting to the introduction of new evidence in that exception.

Applicant requested oral argument. Oral argument was held in Helena, Montana, at 10:00 a.m. on Friday, September 22, 2006, before Hearing Examiner Britt T. Long. Mr. Harris and Mr. Morse appeared. At oral argument, Applicant raised the issue of whether, at the hearing, the hearing examiner properly considered 85-2-311 criteria that were not raised by objection. Ms. Long offered the Applicant the opportunity to brief that issue. Applicant did so by supplemental brief of October 23, 2006. Objectors did not respond.

## **STANDARD OF REVIEW**

The standard of review for a Proposal for Decision is established by Mont. Code Ann. § 2-4-621(3) as follows:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Id. “Substantial evidence” is “evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.” *Swain v. Battershell*, 1999 MT 101, ¶ 34, 294 Mont. 282, ¶ 34, 983 P.2d 873, ¶ 34.

## **DISCUSSION**

### **Applicant's Exceptions**

Applicant argues by exception that the Hearing Examiner's Proposal for Decision was in error because the Hearing Examiner:

- 1) Erred in asserting departmental jurisdiction over an exempt use.
- 2) Erred in evaluating evidence on adverse effect by:
  - a) concluding as a categorical matter that any upstream depletion affects downstream appropriators, and;
  - b) failing to address material evidence offered by the objectors demonstrating that there would be no adverse effect.
- 3) Erred in denying the application on grounds not raised by objectors without following the process set out in Mont. Code Ann. § 85-2-310 (2).

### **Applicant's Supplemental Brief**

Applicant's supplemental brief further addressed exception 3, above.

### **Exception 1. Jurisdiction over an exempt use/right.**

Applicant argues that the Hearing Examiner erred in exercising jurisdiction over an exempt right or, in the alternative, an amount exempt from the permit requirement. Applicant argues that the Hearing Examiner improperly concluded that the Applicant had failed to meet his burden to show that no adverse effect to existing water rights would result from the evaporative losses created by Applicant's proposed reservoir because Applicant proposed to mitigate the adverse effect of that evaporative loss with a water right in an amount exempt from the permitting process and because the total projected volume of evaporative loss is less than the amount that Mont. Code Ann. § 85-2-306 exempts from the permitting process. Applicant's argument underscores a paradox in the legislative schema.

The exemption statute applicant cites reads as follows:

Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

Mont. Code Ann. § 85-2-306 (3) (a). Therefore, the Department has no jurisdiction to require a showing of no adverse impact from an appropriator so long as the appropriation meets the source, volume and beneficial use criteria imposed by the exemption statute. So long as the potential appropriator meets those statutory criteria, the appropriator may create de facto adverse impacts to existing rights or prior appropriators to the full flow and volume amount exempt from regulation in the statute without any recourse on the part of the Department. However, if the potential appropriator seeks any flow rate over 35 g.p.m. or any total volume over 10 a.f. per year or any amount from any source other than a well or developed spring, that potential appropriator must undertake the permitting process, one requirement of which is that the potential appropriator show that that appropriation will not create ANY adverse impacts, regardless of how minimal the flow rate or volume or how minimal the adverse effect. In short, if the potential appropriator seeks an amount less than 10 a.f. per year, the Department may not deny that appropriator the opportunity to create 10 a.f. of adverse effect to senior rights but if the appropriator seeks more than 10 a.f. per year, the Department must deny the appropriator the opportunity to have any adverse effect on senior rights.

Here, Applicant sought more than the exempt amount from a source other than a well or developed spring. Applicant was therefore required to submit a permit application and undertake the permitting process. The permitting process requires the applicant to show that no adverse impact will take place if his application, as a whole, is granted. The hearing examiner therefore addressed the potential for adverse impact created by the application as a whole.

The amount of evaporative loss that Applicant claims the Hearing Examiner erred in



considering (1.3 gallons per minute, year-round)<sup>1</sup> does not occur in isolation but in the context of and as the direct result of a larger proposed appropriation. Finally, while the Applicant is correct in asserting that the Legislature has identified a quantity of appropriation that did not require the full Mont. Code Ann. § 85-2-311 analysis before a water right might be issued, the Legislature has not extended that exemption to allow a certain magnitude of adverse effect to existing water rights.

Where the total amount of appropriation sought required the applicant to undertake the permitting process, Mont. Code Ann. § 85-2-311 does not tolerate a *de minimus* level of adverse effect. Where the total amount of the appropriation sought requires the applicant to undertake the permitting process, Mont. Code Ann. § 85-2-311 requires the applicant to show, by a preponderance of the evidence, that “the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.” Mont. Code Ann. § 85-2-311 (1) (b). The statute doesn’t allow SOME adverse effect. The statute doesn’t allow “adverse effect up to the exempt amount, 10 a.f. a year.” The statute requires that existing water rights “not be adversely affected.”

The hearing examiner found that the application, as a whole, would create adverse effect. “[T]he evaporation make-up water is from the same source that would eventually reach downstream prior appropriators. To have no effect on downstream appropriators, the evaporative loss must come from a non-tributary source.” It is accurate to say that under Mont. Code Ann. § 85-2-306, the Applicant has the right to appropriate water from a ground water source or developed spring under the jurisdictional rate of flow and amount to apply to a beneficial use and the Department may not stop him from doing so regardless of the amount of

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1. Evaporative losses of 1.3 g.p.m. over the course of the April 15- October 15 irrigation period (applicant proposes to appropriate water year round but the adverse effect can only be to downstream irrigators during the period during which they irrigate) are as follows: 60 minutes (1 hour) of evaporation is 78 gallons. 24 hours (1 day) of evaporation is 1,872 gallons. 182 days of evaporation (approximately 6 months—the irrigation period) is 341,640 gallons of evaporation. 325, 851 gallons is one acre foot of water or the amount of water required to cover an acre with water to a depth of 1 foot. 1.04 acre feet of water would be lost to evaporation during the irrigation period, water that would otherwise have traveled downstream and, the hearing examiner concluded, been put to beneficial use for irrigation purposes by downstream appropriators.

adverse effect that results. It does not follow that in the context of a larger appropriation over which the Department does have regulatory jurisdiction, the Department may not consider the quantum adverse impact of the appropriation as a whole, inclusive of an exempt right it may not prohibit.

Applicant's argument is also moot by virtue of two points, both of them hinging on the beneficial use criterion. The first is the logistical impossibility of establishing an exempt right before the construction of the dam that would depend on the prior establishment of the exempt right before the dam could be built. The second is the requirement that both the reservoir and the exemption serve a beneficial use.

Because an exempt right must be put to beneficial use—here's it's mitigation of the impacts of a reservoir that does not yet legally exist—before that exempt right can receive a certificate of water right and a reservoir must qualify for a permit<sup>2</sup>—inclusive of a finding that it creates no adverse impact on existing rights—before it can be built, Applicant faces a logistical impossibility. Simply put, the exempt right may not be created in the absence of the reservoir which may not be built in the absence of the theoretical mitigation provided by the exempt right.

Second, even were the Applicant logistically able to combine the exempt right and the permitted right and even were he able to devote an exempt use to the mitigation of the adverse effects of a larger appropriation without triggering any analysis of the adverse impacts of both appropriations as a combined whole, that exempt use and the larger appropriation the effect of which it mitigates would still both have had to meet the beneficial use requirement of any exemption or permit. “[B]eneficial use shall be the *basis*, the *measure* and the *limit* of all rights to the use of water.” *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986).

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2. “Except as provided in 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works **except** by applying for and receiving a permit from the department.” Mont. Code Ann. § 85-2-302 (1). It's clear from the Department's file that the Applicant has already constructed and filled the 11.28 a.f. reservoir. However, the legal right to continue to fill it to annual consumption of more than 10 a.f. or at a rate of greater than 35 g.p.m. and from a source other than groundwater or a developed spring, does not exist until a permit application is granted.

In regards to the exempt right, Mont. Code Ann. § 85-2-306 (b) (i) requires that, “[w]ithin 60 days of completion of the well or developed spring and **appropriation of the ground water for beneficial use**, the appropriator shall file a notice of completion with the department on a form provided by the department through its offices.” (Emphasis added). At page 4 of his exceptions, Applicant argues that “[s]o long as the exempt use is accurately and completely described, the Department has no discretion or authority other than to issue a certificate of water right. . . .the person seeking that right is not subject to any evidentiary standard in order to perfect same.”

Applicant has overlooked the fact that even for an exempt right, a beneficial use is required to have been established before that right may be awarded a certificate, by statute. Applicant, elsewhere in his exceptions, has raised the question of whether the statutory criterion of beneficial use was properly before the hearing examiner at the hearing. That question will be addressed where he raised it, at exception 3, below. Assuming, for the sake of this point, that the issue of beneficial use, though not the subject of any exception, was properly before the hearing examiner, an exempt right cannot be put to beneficial use to mitigate the adverse effects of a proposed appropriation that is not itself in compliance with the beneficial use requirement.

Jurisdiction is a legal determination. Rather than denying Applicant an exempt water right, as Applicant suggests, the hearing examiner simply evaluated the impacts of the application on existing rights, as required by Mont Code Ann. § 85-2-311. The hearing examiner did have jurisdiction to find that the applicant had not proven by a preponderance of the evidence that the proposed appropriation would not have adverse effect on existing rights, either on its own or in combination with a theoretical exempt right that could not be given a certificate of water right to mitigate what did not yet legally exist.

Applicant may still avail himself of the exemption and acquire an exempt right. So long as he meets the statutory requirements, the Department may not deny him that right. However, in the context of a larger project, the Department need not, in fact may not, turn a blind eye to the adverse effect created by that proposed appropriation as a whole.

## **Exception 2. Defining adverse effect**

Applicant's second exception argues that the Hearing Examiner incorrectly found that evaporative loss to an over-appropriated system created an adverse effect to existing water rights. Applicant argues that the hearing examiner, as a matter of logic, may not reach this legal conclusion unless it has been demonstrated as a matter of fact that the water impounded and lost through evaporation would otherwise reach downstream appropriators. On this point, Applicant misstates the burden of proof. Mont. Code Ann. § 85-2-311 (1) provides that "the department shall issue a permit if **the applicant proves** by a preponderance of evidence" that the relevant criteria are met.

Applicant argues that the Hearing Examiner has the responsibility to conduct the inquiry into whether there is an actual hydrological impact to downstream users' rights given the 1.3 g.p.m. evaporative loss projected from the impoundment, rather than an obligation impartially to consider all the evidence presented by the party with the burden of production in light of the statutory criteria required. The burden, however, is on the applicant to show that the water lost to evaporation would NOT otherwise reach other appropriators with a senior right, not on the hearing examiner to show that it would.

In paragraphs 7 and 8 of his exceptions, the Applicant argues that the Hearing Examiner ignored material evidence presented at the hearing, specifically photographs of the nearly dry East Fork in August of 2001 and the conclusory opinion of Regional Manager Kerbel. Applicant raises the dryness of the East Fork in light of the fact that the dam the subject of this application had not yet been built and the channel was dry anyway. Applicant's reasoning appears to be that water shortages depriving the objector of any diversion in August of 2001 mean that water is already so short that additional impoundments could do no further harm in future years. Applicant also raises the testimony of Regional Manager Kerbel that, in his opinion, the application would create no adverse effect. The hearing examiner reached a different conclusion, factoring the certainty of 1.3 g.p.m. over the irrigation period in evaporative loss into the statutory requirement of no adverse effect, informed by that statute's treatment of adverse effect as a the failure to satisfy water rights of prior appropriators. Mont. Code Ann. § 85-2-311 (1) (b).

Applicant next argues that the because the Hearing Examiner did not specifically address

the photographs of the dry channel and Regional Manager Kerbel's conclusory opinion, his decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." (Exceptions, at 9). Applicant cites Mont. Code Ann. § 2-4-702 (2) (v) and (vii) in support of this standard. Those subsections, however, apply to judicial review of agency action in contested case proceedings, not the intra-agency final decision maker's review of the agency hearing examiner's decision. The correct standard, cited in the introduction to this final order, is that the findings of fact may not be overturned unless "the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence." Mont. Code Ann. § 2-4-621(3). The distinction is fine given that both standards require evidentiary competence, but not totally insignificant.

The hearing examiner, in finding of fact 9, clearly considers testimony of Regional Manager Kerbel in concluding that mitigating conceded evaporative loss from the same source experiencing the loss, where "downstream irrigators [on that same source] have had only high water irrigation since 1995," creates adverse effect on those downstream irrigators. As stipulated expert (exceptions, at 8), Mr. Kerbel's testimony is presumed to be substantial, competent evidence on both the ultimate question and evidence concerning which he is expert. The hearing examiner considered Mr. Kerbel's testimony and apparently came to the conclusion that the fact that the evaporative loss would be mitigated from the same source meant that the evaporative loss would not, de facto, be mitigated.

### **Exception 3. Beneficial Use Improperly Raised**

Applicant raises what is essentially a jurisdictional question and argues at exception 3 that the hearing examiner erred in addressing beneficial use, an issue that the Applicant argues was not before the hearing examiner at the hearing because it was not raised by objection and because a prehearing order limited the scope of the hearing to other issues. At oral argument, the Applicant was offered the opportunity to brief this issue further. He took that opportunity.

Applicant notes in paragraph 2 on page 9 of his exceptions that an order entered September 9, 2005, less than two weeks before the hearing, narrowed the statutory criteria to be

addressed at the hearing to legal availability and adverse effect. Applicant cites that order and an apparent tension between the procedural paths contemplated by Mont. Code Ann. § 85-2-309 and Mont. Code Ann. § 85-2-310 in support of the conclusion that the hearing examiner should not, therefore, have addressed beneficial use in the contested case hearing.

Applicant elaborated upon this argument in his supplemental brief with “DNRC—acting apparently through Hearing Officer Brasen—erred in proposing to deny Deaterly’s application in grounds not raised by the objectors without following the process set out in Mont. Code Ann. 85-2-310 (2). Applicant’s argument distills as follows: where an application has been deemed correct and complete and a valid objection has been made to that application, a contested case hearing shall be held “on the objection.” Mont. Code Ann. § 85-2-309 (1). Where no objection has been filed, if the Department intends to deny that application, it must follow the procedure set forth in Mont. Code Ann. § 85-2-310 (2) whereby the Department delivers a “statement of opinion” to the Applicant informing him of the Department’s reasons for the denial and providing for a hearing if the Applicant requests one within 30 days. Applicant concludes, “[a]bsent a statement of opinion by the DNRC under Mont. Code Ann. § 85-2-310 (2), a hearing officer is without jurisdiction to consider any issue not raised in the objections.” (Supplemental brief, at 11).

Applicant also raises the issue of fairness with the question of how he could have known that his application faced denial for failure to meet the burden on beneficial use when that criterion was not the subject of an objection, the department did not provide him with a statement of opinion on that criterion as he argues is required by Mont. Code Ann. § 310 (2) and when, in fact, a September 9, 2005 Departmental minute order limited the scope of the hearing, but apparently not the scope of the Proposal for Decision, to the permit criteria of legal availability and adverse effect.

The Department has explicitly adopted the position that the Applicant has the burden of proving all of the applicable criteria to the standard of proof required (citation omitted). Lack of an objection to a particular criteria does not relieve the applicant from its burden (citations omitted). Once a correct and complete objection is received, and unless resolved, the Department must hold a hearing. . . (citation omitted).

Without question, the Department determines whether the applicant has met its burden. (Citation omitted). The Hearing Examiner was appointed by the Department to decide this case on the basis of whether all of the applicable criteria are met.”

*In the Matter of Application to Change Water Right No. 411K-30016816 By City of Great Falls*, Order of January 10, 2007 (Attached).

Because the Department’s position mandates that beneficial use be addressed by the hearing examiner, his conclusion that the Applicant failed to satisfy the beneficial use criterion must also be assessed here. Apart from the procedural, fairness arguments raised above, the Applicant raises no substantive exceptions to the hearing examiner’s determination that the applicant failed to provide sufficient evidence “that the proposed rate and volume of water requested for the fish purpose is the minimum necessary for the intended purpose.” The Applicant suggests no shortcoming in the hearing examiner’s factual analysis, but argues that it was misplaced and it should not have taken place as a result of the contested case hearing.

Accepting the hearing examiner’s factual analysis, his conclusions of law are sound. “[B]eneficial use shall be the *basis*, the *measure* and the *limit* of all rights to the use of water.” *McDonald*, supra. The minimum amount of water necessary to support the proposed beneficial use is the appropriate standard. *In the matter of Bitterroot River Protective Association v. Kenneth R. and Judith A. Siebel and the Montana Department of Natural Resources and Conservation*, Cause No. BDV-2002-519, Order On Petition For Judicial Review, Montana First Judicial District Court (2003), *aff’d on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518. Applicant did not define the fish and wildlife or fire protection beneficial use to a degree of specificity that would allow definition of a minimum amount reasonably necessary. By operation of logic, the hearing examiner could not have reached any other conclusion but that the Applicant did not meet the beneficial use criterion by a preponderance of the evidence, as required by Mont. Code Ann. § 85-2-311.

## ORDER

Application for Beneficial Water Use Permit No. 43C-30007297 BY DEE DEATERLY is hereby DENIED.

### **NOTICE**

This final order may be appealed by a party in accordance with the Montana Administrative Procedures Act (title 2, chapter 4, Mont. Code Ann.) by filing a petition with the appropriate District Court within 30 days after service of this order. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing District Court, the requesting party must make arrangements for the preparation of the written transcript with a transcriber. If that party makes no arrangements, the Department will simply transmit a copy of the audio recording of the oral proceedings directly to the District Court.

Dated this 2nd day of February, 2007.

/Original signed by Britt T. Long/  
Britt T. Long  
Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601

### **CERTIFICATE OF SERVICE**



This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 5<sup>th</sup> day of February 2007 by first class United States mail.

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/Original signed by Jamie Price/  
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